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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 101

E. EDELMANN & COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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STATUTE:

Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, Sec. 2(a), Title 15 U. S. C. § 13(a) 3

IN THE

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No. .....

E. EDELMANN & COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, E. Edelmann & Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above entitled case on December 14, 1956.

OPINIONS BELOW.

The Hearing Examiner's Initial Decision appears in the printed record, at pages R. 45-72. The Opinion of the Commission appears at R. 75-87. The Opinion of the Court of Appeals is reported at 239 F. 2d 152 (Appendix, *infra*, pp. i-viii).

JURISDICTION.

Final Decree of the Court of Appeals was entered on December 14, 1956 (Appendix, *infra,* p. ix). A timely petition for rehearing was denied January 16, 1957 (Appendix, *infra,* p. x).

A Motion by petitioner to the Court of Appeals for leave to file a petition requesting that said Court of Appeals sit *en banc* to consider modification of the cease and desist order or remand of the case to the Federal Trade Commission, was denied on February 7, 1957 (Appendix, *infra,* p. xi).

This Court's jurisdiction is invoked under Title 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

1. (a) Whether the Seventh Circuit Court of Appeals' denial of Petitioner's Motion requesting said Court of Appeals to modify the Commission's Cease and Desist Order herein, in the same manner as it had done in the case of *C. E. Niehoff* v. *Federal Trade Commission* (C. A. 7—Appeal No. 11526—decided January 9, 1957) constitutes error, or produces an intra-Circuit conflict of decisions which requires correction by the Supreme Court?

(b) Whether the Court of Appeals unreasonably failed to stay forthwith execution of a cease and desist Order against petitioner until petitioner's various competitors, who are using similar forms of discount structures, can be subjected to similar judgments and orders; whether such failure by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its competitors may still continue their existing discount structures, thereby inevitably causing petitioner to suffer loss of business

and serious economic damage; and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of petitioner.

STATUTE INVOLVED.

Section 2(a) of the Clayton Act, 38 Stat. 730 as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a) (Appendix, *infra*, pp. xii-xiii).

STATEMENT.

The facts relevant to the Question Presented are:

The Complaint in this proceeding charges that petitioner, E. Edelmann & Co., violated Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, by having a pricing structure which discriminates in prices at which petitioner's products are offered to different purchasers.

During the course of the trial proceedings before the Hearing Examiner, counsel for petitioner sought to introduce testimony which would show that the result of a cease and desist order against petitioner would result in a substantial loss of its business, thereby causing irreparable economic damage, if not economic death, of petitioner, unless petitioner's competitors, who were using similar forms of discount structures, were also so precluded by the Commission from indulging in the pricing practices which petitioner was to be precluded from (R. 281-283).

The Examiner refused to admit such evidence (R. 281), and counsel for petitioner submitted same by a formal Offer of Proof (R. 281-283).

The Offer of Proof indicated specifically that if Edelmann were under an Order to cease and desist extending its present discount structure, while Edelmann's competitors remain free to continue with their discount structures, the anticipated loss of Edelmann's customers to

Edelmann's competitors would severely damage Edelmann's business (R. 282).

The Examiner's failure to permit introduction of the foregoing evidence was one of the assignments of error to the Commission (R. 84), but the Commission rejected petitioner's contentions with respect thereto (R. 84).

Petitioner's Amended Petition for Review, in the Court of Appeals, specifically designated as error the Commission's affirmance of the Hearing Examiner's exclusion of the testimony relating to the injury that would be caused petitioner under the proposed cease and desist Order (R. 93, Point 15(a) of "Points Upon Which Petitioner Intends to Rely"). This specific point was also raised both in petitioner's Petition for Rehearing to the Court of Appeals (denied January 16, 1957), and in petitioner's Motion to the Court of Appeals to permit filing of a petition requesting that the Court of Appeals sit *en banc* to consider modification of the cease and desist order or remand of the case to the Federal Trade Commission (denied February 7, 1957).

In another Federal Trade Commission case decided by the 7th Circuit Court of Appeals, wherein a similar charge involving pricing structure was involved, *C. E. Niehoff & Co.* v. *Federal Trade Commission* (Appeal No. 11,526 in the Court of Appeals for the 7th Circuit, decided January 9, 1956—decision not yet officially reported, but reproduced in the Appendix, *infra*, pp. xiv-xxiv) the court struck the requirement from the cease and desist Order therein that it go into effect "forthwith" (Appendix, *infra*, p. xxiii), while in the instant case, the *Edelmann* case, the same Court of Appeals affirmed (Appendix, *infra*, p. ix) the cease and desist Order which directed that the Order go into effect "forthwith" (R. 72, 74).

REASONS FOR GRANTING THE WRIT.

I.

The Supreme Court has just granted a petition for writ of certiorari limited to substantially the identical question raised herein, in the case of *Moog Industries, Inc., Petitioner* v. *Federal Trade Commission, Respondent*, Supreme Court, October, 1956 Term, No. 750. Writ of Certiorari granted March 25, 1957, 25 Law Week 3277.

The *Edelmann*, *Moog*, and *Niehoff* cases, *supra*, belong to a group of similar Federal Trade Commission cases that involve substantially similar complaints against manufacturers who are all part of the same industry, namely the automotive-replacement-parts industry. These cases all began about the same time and have progressed along somewhat parallel paths before the Hearing Examiners and through the Commission and now through the Courts of Appeals of the various Circuits. The ultimate outcome of these cases will have far-reaching import in the automotive-replacement-parts industry, and, therefore, the ultimate result of these decisions have great public importance.

The only apparent substantive difference in the outcome of these various cases, is the point upon which the Supreme Court has granted certiorari in the *Moog* case. So as to prevent an unjust or unfair result in petitioner's case, it is urged that this petition for writ of certiorari should be granted so that the instant case will retain the same posture as the other cases to which it is related.

II.

The decisions by the Seventh Circuit Court of Appeals in the instant *Edelmann* case and in the *Niehoff* case, *supra*, are apparently in direct conflict, thereby producing an

intra-Circuit conflict which requires correction by the Supreme Court.

Except as to differences in facts which are unimportant with respect to the Question Presented herein, both the respondent, *Edelmann*, and the respondent, *Niehoff*, in their respective cases, attempted to show that a cease and desist Order against them, which would not be leveled against their competitors, would effect substantial loss of business, irreparable economic damage, and possible economic death of the respondent.

In the *Edelmann* case, the evidence was excluded by the Examiner's ruling. In the *Niehoff* case, the evidence appears in the record. However, the Offer of Proof by Edelmann's counsel (R. 281-283) is substantially to the same effect as Proposed Finding No. 41 proposed by Niehoff's counsel in the *Niehoff* case (Appendix, *infra*, p. xxv).

The Hearing Examiner rejected the contention both in the *Edelmann* case and in the *Niehoff* case.

The Commission ruled similarly on the same contention in both the *Edelmann* case (R. 84) and in the *Niehoff* case (Appendix, *infra*, p. xxvi).

Both Edelmann and Niehoff included this contention as one of the points on appeal before the Court of Appeals. (See R. 93, point 15(a) in *Edelmann* case, and Appendix, *infra*, p. xxvii).

In the *Edelmann* case the Court of Appeals refused to stay the effect of the cease and desist order, while in the *Niehoff* case the same Court of Appeals struck the requirement from the cease and desist order that it go into effect "forthwith".

The foregoing produces a direct conflict between decisions by the same Court of Appeals, and it is submitted that the Supreme Court should decide which of the decisions is correct and should be followed. This Court has,

in other circumstances, granted certiorari when there has been a conflict between decisions of a single circuit. *John Hancock Insurance Company* v. *Bartels*, 308 U. S. 180, 181, 60 S. Ct. 221, 222; *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507, 508, 70 S. Ct. 322.

Of particular significance in the instant case is the fact that the decisions of the *Edelmann* and *Niehoff* cases were rendered by different panels of the same court, Judges Finnegan, Swaim and Schnackenberg sitting in the *Edelmann* case, and Judges Major, Finnegan and Schnackenberg sitting in the *Niehoff* case. This factor was particularly noted by the Supreme Court in granting certiorari in the *John Hancock Insurance Company* case, *supra*, and *Dickinson* case, *supra*.

There is nothing in the records or in the decisions by the 7th Circuit Court of Appeals which would indicate why Niehoff should be saved from economic extermination while Edelmann should not be similarly saved. Equity demands that respondents in Federal Trade Commission cases be treated equally; otherwise it may place one respondent in a position where it is unable to fairly compete with its competitors. *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182 (C. A. 2—1932).

It is submitted to be of great public importance to determine what the policy of Courts should be in situations of the type herein, where forthwith execution of cease and desist Orders may effect economic death of a manufacturer to the benefit of the manufacturer's competitors who are indulging in the same practices which the manufacturer is being prohibited from indulging in.

The actual effect of the denial by the 7th Circuit Court of Appeals to hold the cease and desist Order in abeyance, or to modify it, places petitioner herein in a decidedly unfavorable position competitively and in effect denies it equal protection of the laws. Under such conditions, the

very purpose of the Robinson-Patman Act, to protect small competitors such as the petitioner, would be defeated.

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted,

Respectfully submitted,

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Decision of Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11500 September Term and Session, 1956

E. EDELMANN & COMPANY, *Petitioner.*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for Review of a Decision of the Federal Trade Commission.

December 14, 1956

Before FINNEGAN, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* Petitioner seeks to set aside a cease and desist order entered by the Federal Trade Commission on a complaint charging it with violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13.

The complaint charged that petitioner, E. Edelmann & Company, directly or indirectly discriminated in price between the different purchasers of its automotive products and supplies by selling said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies were sold to various larger purchasers generally competitively engaged with said less favored purchasers.

Petitioner is engaged in the manufacture of automotive products and supplies which it sells on a nationwide basis to automobive jobbers, oil and tire companies and industrial users. These products, which petitioner classifies into so-called "lines," *i.e.*, a brass line, a glass line and a brake line, are sold under petitioner's brand name and under various private brand names. The prices charged industrial accounts were not involved in this proceeding, and the hearing examiner dismissed from consideration the prices charged private brand accounts. In 1949 petitioner's total sales volume approximated $1,600,000.00, of which the brass line accounted for 45% ; the glass line, 53% ; and the brake line, 2%.

Petitioner sells its products to some 3,500 to 4,000 purchasers, of which approximately 40 are classified as warehouse distributors, 15 to 20 as private brand accounts, 6 as cooperative buying groups, 50 as industrial accounts, and the remainder as automotive jobbers who either buy from petitioner's warehouse distributors or from petitioner direct. The respondent does not complain of the warehouse distributor's discount on the products resold to automotive jobbers. The price differentials which were found to be unlawful discriminations resulted from the application of a 20% discount from a distributor's net price on purchases of petitioner's brass line and 15% on the glass and brake lines. These discounts were accorded to the 40 warehouse distributors and the six cooperative buying groups who purchased 28% of petitioner's sales volume. Other price differentials which were found unlawful related to a quantity discount schedule which provided a maximum discount of 15% off "list" on single orders for brass fittings totalling $25,000.00, and 15% on single orders totaling $15,000.00 for assorted flexible lines.

Petitioner made no effort to demonstrate any cost justification for its pricing practices, although it did attempt

to show that the discriminatory prices were made in good faith to meet equally low prices of competitors. The Commission found that there was a reasonable probability that petitioner's pricing practices substantially adversely affected competition at the secondary level and accordingly entered its order to cease and desist.

Petitioner attacks the order on the grounds that there is insufficient evidence to support the Commission's finding of probable injury to competition; that the Commission erred in finding that petitioner failed to establish that its discriminatory prices were made in good faith to meet an equally low price of a competitor; and that the order of the Commission is too broad and in excess of its authority.

Section 2(a) of the Clayton Act, as amended, does not require a finding that the price discriminations have in fact had an adverse effect on competition. It is enough that they may have the prescribed effect. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46; *Corn Products Co.* v. *Federal Trade Commission*, 324 U.S. 726, 738; *National Lead Co.* v. *Federal Trade Commission*, 7 Cir., 227 F. 2d 825, 835. This is too well settled to admit of serious doubt. The test of injury to competition has been formulated in various ways. In the *Corn Products* case, 324 U.S. at p. 738, the Court stated, "The use of the word 'may' was not to prohibit discrimination having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." Later in the opinion, however, 324 U.S. at p. 742, the Court stated, "As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." This latter formulation was adopted in the *Morton Salt* case, 334 U.S. at p. 46, with the qualification that, "This language is to be

read also in light of the following statement in the same case [*Corn Products* case, 324 U.S. at p. 738], discussing the meaning of § 2(a), as contained in the Robinson-Patman Act, in relation to § 3 of the Clayton Act * * *." 334 U.S. at p. 46, n. 14. Justice Jackson, however, preferred an outright adoption of "reasonable probability" as the test applicable to the determination of the presence or absence of the defined effect on competition as opposed to a "reasonable possibility" standard. 334 U.S. at pp. 55-58. Nevertheless, the Commission found that it was "reasonably probable" as well as "reasonably possible" that petitioner's price discriminations had the defined effect on competition at the secondary level.

If there is substantial evidence to support the finding of the Commission the order must be affirmed, 5 U.S.C.A. § 1009(e)(5); *Universal Camera Corp.* v. *N. L. R. B.*, 340 U.S. 474, 488, and substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated-Edison Co.* v. *N. L. R. B.*, 305 U.S. 197, 229.

We therefore turn to the record which shows substantial discriminations in price; that the purchasers of petitioner's products sold in a market where competition was keen; that these purchasers operated on small profit margins; that many of the purchasers found it expedient to enter into group buying arrangements for the purpose of aggregating their purchases and thereby obtaining higher discounts that they would otherwise receive as ordinary jobbers in contrast to the warehouse distributor.

Notwithstanding these facts, petitioner urges that there is no proof of injury or probable injury to competition, only inferences that are unsupported by reason. We must disagree. On the basis of the above facts the Commission found what appears reasonable and obvious: that the com-

petitive opportunities of the less favored purchasers were injured when they had to pay substantially more for petitioner's products than their competitors had to pay. Petitioner further urges that the price discriminations and the profits derived therefrom by the favored purchasers were small or inconsequential and can only have negligible effects upon competition. Although it has been held that there is no automatic *de minimis* exception in Section 2(a) which requires the Commission to insert a maximum permissible discrimination in its order, *Ruberoid Co.* v. *Federal Trade Commission*, 2 Cir., 189 F. 2d 893, modified 191 F. 2d 294, aff'd but enforcement denied 343 U.S. 470, it is implicit in the Act that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. See our opinion in *Whitaker Cable Co.* v. *Federal Trade Commission*, No. 11494, decided this same day. But it must be remembered that in enacting the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C.A. § 13, Congress undertook to strengthen this phase of the Clayton Act which it thought had been too restrictive in practice by directing emphasis to individual competitive situations rather than competition in general. See Sen. Rep. No. 1,502, 74th Cong. 2d Sess. (1936); H. R. Rep. No. 2,287, 74th Cong. 2d Sess. (1936); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 48-50.

There was evidence tending to show that differentials of small amounts were important in the trade and the existence of the so-called cooperative buying groups bears this out. These and other findings justified the Commission in concluding that the profit differences which resulted from petitioner's pricing practices were not insignificant or infinitesimal. Petitioner would have us disregard the implications that arise from the existence and function of the buying groups because it is not appealing

the point that they did not perform a true warehouse function and that petitioner has quit selling to such groups. However, petitioner did sell to such groups and we are justified in drawing inferences from this fact as did the Commission with reference to effect on competition of petitioner's pricing practices, notwithstanding the fact that in another context a question of mootness might arise concerning these buying groups.

Certain of petitioner's jobbers testified that they knew that the warehouse distributor bought at a lower price than they did and stated that they did not care; that warehouse distributor competition with them had not injured them in any way; and that they knew of no lessening of competition nor of any corralling of business by one or a few of their competitors. In view of the competitive condition of the market as reflected by the record, the small profit margins on which the participants in this market operated and the size of the discriminations, we believe that the Commission was justified in disregarding this testimony. In addition, petitioner suggested resale prices at all levels of distribution and it was found that these suggested prices were regularly adhered to. This explains, at least in part, why the warehouse distributors did not "corral" the market by taking advantage of the discounts accorded them by cutting prices. It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from the non-favored competitors. Sales are not the sole indicium that reflect the health of the competitive scene. See *Moog Industries, Inc.* v. *Federal Trade Commission*, 8 Cir., No. 15,370, decided November 5, 1956, Slip Opinion at pp. 11, 12; *Bruce's Juices* v. *American Can Co.*, 87 F. Supp. 985, 990, aff'd 187 F. 2d 919, modified 190 F. 2d 73, cert. dismissed 342 U.S. 875.

Petitioner urges that since the pricing practices which it follows are traditional in its industry, petitioner is justified in meeting the equally low prices of its competitors and that this is a complete defense under Section 2(b), 15 U.S.C.A. § 13(b). The record shows, however, and the Commission so found, that petitioner did not meet the different prices of its two principal competitors nor those of any other competitors, and that the discount system employed by petitioner was not the same as that of its two principal competitors. Section 2(b) places the burden upon the price discriminator to establish that its lower price was made in good faith to meet an equally low price of a competitor. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37; *Federal Trade Commission* v. *Staley Co.*, 324 U.S. 746. The record amply demonstrates that petitioner failed to discharge this burden.

Finally, petitioner insists that the order to cease and desist is too broad in scope and exceeds the authority of the Commission because its provisions are not limited to instances of price discrimination in the sale of the specific types of automotive products of like grade and quality to different purchasers competing in the resale of such specific types of automotive products.

The Commission ordered that petitioner:

> " • • • in or in connection with the sale of automotive products in commerce, as 'commerce' is defined in the Clayton Act as amended, do forthwith cease and desist from discriminating, directly, or indirectly, in the price of said automotive products of like grade and quality, by selling to any direct or indirect purchaser at net prices higher than the net prices charged any other purchaser, direct or indirect, competing in fact in the resale and distribution of said products."

This order is substantially identical to the one approved by the Supreme Court in *Federal Trade Commission* v.

Ruberoid Co., 343 U.S. 470; see also *Moog Industries, Inc.* v. *Federal Trade Commission*, 8 Cir., No. 15,370, decided November 5, 1956. Petitioner's objections are not well founded. The order encompasses only the specific means by which petitioner has discriminated in the past and is broad enough to prohibit variances which would accomplish the same result. The Commission is not required to confine its order to the narrow area transgressed by petitioner, it must be permitted sufficient leeway so that its order may not be reduced to a nullity by technical, but not actual, compliance. See *Federal Trade Commission* v. *Ruberoid Co.*, *supra*, at p. 473.

We have considered the other issues raised by petitioner and have found them to be without merit.

The order is

AFFIRMED.

Judgment.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, December 14, 1956.

Before

Hon. Philip J. Finnegan, *Circuit Judge.*
Hon. H. Nathan Swaim, *Circuit Judge.*
Hon. Elmer J. Schnackenberg, *Circuit Judge.*

E. Edelmann & Company, *Petitioner,* vs. Federal Trade Commission, *Respondent.*	Petition for Review of a Decision of the Federal Trade Commission.
No. 11500	

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that order of the Federal Trade Commission entered in this cause on April 29, 1955, be, and the same is hereby, AFFIRMED.

True Copy:
Teste:

(SEAL)

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

Denial of Petition for Rehearing.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, January 16, 1957.

Before

Hon. Philip J. Finnegan, *Circuit Judge.*
Hon. H. Nathan Swaim, *Circuit Judge.*
Hon. Elmer J. Schnackenberg, *Circuit Judge.*

E. Edelman & Co., *Petitioner,* vs. Federal Trade Commission, *Respondent.*	Petition for Review of an Order of the Federal Trade Commission.

No. 11500

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

Denial of Motion re En Banc Hearing.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Thursday, February 7, 1957.

Before
Hon. Philip J. Finnegan, *Circuit Judge.*
Hon. H. Nathan Swaim, *Circuit Judge.*
Hon. Elmer J. Schnackenberg, *Circuit Judge.*

E. Edelman & Co., *Petitioner,*
No. 11500 *vs.*
Federal Trade Commission, *Respondent.*

Petition for Review of an Order of the Federal Trade Commission.

On consideration of the motion and affidavit of counsel for petitioner for leave to file a petition that this Court sit *en banc* to consider modification of the cease and desist order or remand of the case to the Federal Trade Commission,

IT IS ORDERED by the Court that the said motion for leave to file petition be, and same is hereby, DENIED.

Robinson-Patman Amendment, Clayton Act, U. S. C., 49 Stat. 1526, Title 15—

SECTION 13. DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES—PRICE; SELECTION OF CUSTOMERS.

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; PROVIDED, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: PROVIDED HOWEVER, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities

greater than those so fixed and established AND PROVIDED FURTHER, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: AND PROVIDED FURTHER, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

BURDEN OF REBUTTING PRIMA FACIE CASE OF DISCRIMINATION.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: PROVIDED, HOWEVER, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) * * *

(d) * * *

(e) * * *

(f) * * *

Decision of Court of Appeals in Niehoff v. F. T. C.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 11526 September Term, 1956, September Session, 1956.

C. E. NIEHOFF & Co., a corporation, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition to Review an Order of the Federal Trade Commission.

January 9, 1957.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Petitioner, sometimes referred to herein as Niehoff, asks us to review an order to cease and desist issued by the respondent, sometimes referred to herein as the commission, upon a complaint charging violation of section 2 (a) of the amended Clayton Act.[1]

1. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such com-

The complaint charges that Niehoff, in its nation-wide sale of automotive ignition and hydraulic brake parts to automotive jobbers competitively engaged in the resale of such products, discriminates in price between its small quantity purchasers and its large quantity purchasers, and that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Niehoff and its favored purchasers are engaged, or to injure, destroy or prevent competition with Niehoff, said favored purchasers or with customers or either of them.

Niehoff's amended answer admits that it is engaged at Chicago, Illinois, in the manufacture, sale and distribution in interstate commerce of automotive products and supplies to different purchasers and that it is in active and substantial competition with other companies similarly engaged in manufacturing and selling automotive products and supplies; admits that Niehoff sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all of its purchasers and are not discriminatory, and denies that the effect thereof may be substantially to lessen competition and create a monopoly in its line of commerce; alleges that such price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods of quantities in which such

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modities are sold for use, consumption, or resale within the United States * * *, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly received the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14–21, and 22–27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." 15 U. S. C. A. § 13.

products and supplies are sold or delivered to its purchasers; and also alleges that such price differentials as were granted by Niehoff were granted in good faith to meet equally low prices of its competitors.

Following extensive hearings before an examiner, he entered findings of fact. He concluded "that petitioner sold its products of like grade and quality to customers at different prices, that the customers competed with one another in the resale of these products, and that the different prices were discriminatory and in violation of section 2 (a) * * *"; that "* * * the differentials in price were not justified by differences in cost under the cost proviso of section 2 (a)" (except in a minor particular which the commission on review set aside); and that "* * * the discriminations were not justified under the 'good faith' proviso of section 2 (b) of the Act." Accordingly the examiner entered a provisional order to cease and desist. Upon cross appeals to the commission by both parties, the commission, on May 17, 1955, affirmed the findings and order of the examiner with slight modification and entered the order now under review. Summarized, the basic facts, which are not in real dispute, are now stated.

Niehoff sells and distributes in commerce certain automotive products and supplies. There are many different items classified into three lines: an ignition line, a hydraulic line, and a testing equipment line.

Niehoff's total sales volume in the sample year 1949 was $2,068,499, and of this amount approximately 90% represented sales in the ignition line, 3 to 6% in the hydraulic line, 2% in the testing equipment line, and 2% in rebuilt items.

Its domestic sales were made to some 866 jobber accounts. The prices paid by these customers were based in the first instance on Niehoff's jobber price list which is

the base price schedule. Niehoff grants discounts from this schedule which vary the net prices actually paid by its several jobber accounts. For discount purposes Niehoff classified its jobber customers at the beginning of each year on the basis of the purchases made during the preceding year. A 2% discount for prompt payment is accorded to all accounts regardless of classification. Niehoff grants uniform freight allowances to all jobber customers and treats all accounts uniformly in the handling of merchandise returned for credit. As found by the examiner, the various accounts are placed in one of four classifications:[1a]

1. Jobbers whose annual purchases are less than $1,200 are classified as "jobbers without agreement"[2] and who pay the regular jobber list price.

2. Jobbers whose annual purchases range from $1,200 to $3,600 receive Niehoff's "jobbers agreement" and as such receive the following discount and allowances from the base jobber price:

Annual volume of purchases	Discount allowance, percent
$1,200-$2,400	5
$2,400-$3,600	7
$3,600 and over	10

3. Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "distributors without agreement" and receive a 10% discount off Niehoff's base jobber price on all purchases.

4. Jobbers whose annual purchases are in excess of $6,000 are classified as "distributors with agreement" and

1a. The classifications referred to are somewhat confusing, there appearing to be overlapping of the classes. This circumstance is in our view of the case immaterial.

2. In 1950 the designations used to describe the accounts in each classification were changed but the basis of classification and the buying prices remained the same for each class.

as such receive 10% discount off Niehoff's base prices on all purchases and the following additional discount allowances in the form of merchandise credits:[3]

Annual volume of purchases	Discount allowance, percent
$6,000-$8,400	5
$8,400-$12,000	6
$12,000 and over	[4]7

The commission found, and it is not disputed, that this system of pricing provided different net purchase prices. It also found, and the record shows, that Niehoff sold to more than one account in a single city or trading area and that the net prices paid by accounts within given trading areas varied. It was further found that accounts within trading areas competed with one another in selling Niehoff's products.

The commission found that Niehoff's price differentials constituted discriminations in price. It was further found that the effect of these discriminations may be to substantially lessen, injure, destroy, or prevent competition in the resale of Niehoff's products. This finding took into account the size of the differentials, amounting to as much as 16% in net purchase price; the fact that the record shows that the automotive parts business is highly com-

3. The additional discount allowances do not apply to purchases of service stocks, equipment and brake fluid.

4. In 1949, 299 accounts were in class 1 and purchased at jobber list less cash discount. 228 were in class 2; 241 accounts were in class 3 and 98 accounts in class 4. There was a deviation from the stated price plan in that Niehoff sold to one buying group known as Cotton States, Inc., which in 1949 was composed of nine jobbers. Niehoff treats this group as a single purchaser, selling on its class 4 basis. The jobber member pays the invoice to group headquarters and it in turn remits monthly for all purchases by its members during that month. Except for one monthly billing instead of 9, the operation saves Niehoff nothing. In 1949 the annual purchases of only one member would individually have justified the discount given.

petitive; that jobbers stock many lines ranging from 15 or 20 for the small operator to more than 100 for the large operator and these lines generally consist of thousands of items; that net profit depends on the accumulation of small margins on the numerous items handled; and that the record also shows that the margin of profit generally runs about 4% of sales.

The commission also found that Niehoff's discounts to favored distributors contribute a direct and powerful advantage to the recipient and concluded that there was a reasonable probability that Niehoff's pricing practices substantially lessened competition at the secondary level and that the effect of discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefit of the discriminations and those to whom they were not accorded.

Niehoff introduced evidence for the purpose of justifying its price differentials by differences in costs of sale and delivery. This evidence pertained to sales expenses, advertising expense, and cost of processing orders. Upon consideration of all this evidence the commission rejected Niehoff's claim that its differentials were cost-justified within the meaning of the proviso of section 2 (a).

Niehoff also introduced evidence to prove that its price differentials were made in good faith to meet the equally low price of a competitor or competitors within the meaning of the good faith proviso of section 2 (b) of the Act.[5]

5. "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14–21 and 22–27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of

The commission found that Niehoff did not establish any price or prices as a response to a particular competitor, and that, once the base price structure was established with reference to general competitive conditions, Niehoff did not deviate to meet the prices of particular competitors. It also found that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices. On the basis of this finding the commission rejected the claim that Niehoff's price discriminations were justified under the good faith proviso of section 2 (b).

I. With the exception of certain phases of this case with which we shall hereinafter deal specially, our holding in this case is controlled by our decisions in *Whitaker Cable Corporation* v. *Federal Trade Commission*[6] and *E. Edelmann & Co.* v. *Federal Trade Commission*.[7] We adhere to the views expressed in those cases.

II. We have made a thorough search of the record and considered the evidence introduced by both parties on the issues involving cost justification and the alleged good faith of Niehoff in meeting equally low prices of its competitors. While there may be some conflict in the evidence upon these issues, we find that there is substantial evidence to support the findings of the commission.[8] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229.

It is not the law that we may displace the commission's

services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. A. § 13 (b).

6. No. 11494 (C. C. A. 7) decided 12–14–56.

7. No. 11500 (C. C. A. 7) decided 12–14–56.

8. 5 U. S. C. A. § 1009 (e) (5); *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 488.

choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*. *Universal Camera Corp.* v. *N. L. R. B., supra,* 488.

For the reasons herein set forth, the commission's order to cease and desist will be affirmed, subject to a modification to which we now refer.

III. At this point we consider Niehoff's prediction that it "would be forced out of business if the traditional pricing practices which it now follows were denied to it while its competitors are free to continue such practices." There is uncontradicted evidence in the record to factually support this prediction.

The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.

It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher

9. Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors

prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.

The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission "shall issue * * * an order requiring such person to cease and desist from such violations * * * *within the time fixed by said order.*" (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act[11] gives this court power, *inter alia,* to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held[12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original

10. 15 U. S. C. A. § 21.

11. 15 U. S. C. A. § 21.

12. *Natural Gas Pipeline Co.* v. *Federal Power Commission,* 128 F. 2d 481, 484.

jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff "forthwith" cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by striking the word "forthwith" therefrom and by adding to said order the following: "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." As thus modified, the order is affirmed.

ORDER, AS MODIFIED, AFFIRMED.

FINNEGAN, *Circuit Judge.* Dissenting. Affirming this order of the Commission and then directing its indeterminate suspension, causes me to diverge from the majority view. Section 11 of the Clayton Act, as amended, mandates that: "The findings of the Commission * * * as to the facts, if supported by substantial evidence, shall be conclusive," 64 Stat. 1127, 15 U. S. C. § 21 (1952). If, as my brothers find, this order squares with the statutory yardstick then a violation of the Clayton Act has been established. But, on the other hand if the order, approved

by the majority, requires modification for the reasons they state, then it would seem the Commission's order is defective since it is unsupported by evidence concerning petitioner's competitors. After all the matter involves an economic problem within a defined industry. In its opinion (T. R. 1027-1028) the Commission stated, *inter alia:* "The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was no controlling to decision here • • • The lawfulness or unlawfulness of its competitors' prices • • • are not in issue inasmuch as respondent's defense has been legally insufficient on other grounds."

We reach much too far into the administrative agency's province by reserving our jurisdiction contingent upon "the future course of the Commission's proceedings aaginst Niehoff's competitors." Either such matters are now before us and we have failed to properly evaluate them in reviewing evidence of price discrimination, or, they are not, now, and in that state of affairs we have no business with them. Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

Extract from "Respondent's Proposed Findings, etc." Found on Page 960 of the Printed Record in the Case of C. E. Niehoff & Co., Petitioner, v. Federal Trade Commission, Respondent, Appeal No. 11526 in the U. S. Court of Appeals for the 7th Circuit.

PROPOSED FINDING No. 41.

"If Respondent were compelled by an order of the Commission to go on a single jobber price basis without a volume discount plan applicable thereto while its competitors were not under a similar compulsion, Respondent would be compelled to cease its operations and go out of business. On the basis of its 1949 operating costs, if Respondent used as its single price its present base jobbers price, it would lose all of its jobber accounts except those in the Jobber without Agreement classification, which accounted for only 7.5% of Respondent's 1949 volume; if Respondent granted all jobbers a uniform 10% discount from its present jobbers prices, it would lose all of its jobber accounts in its Jobber with Agreement classification, which accounted for 47.8% of its 1949 volume and would incur an operating loss of $123,000 annually; and if Respondent used a uniform 15% discount, its losses would be so great in sales to the small jobber accounts, it would incur an operating loss of nearly $100,000 a year."

* * * * *

Extract from the "Opinion of the Commission" Found on Page 1026 in the Printed Record in the Case of C. E. Niehoff & Co., Petitioner, v. Federal Trade Commission, Respondent, Appeal No. 11526 in the U. S. Court of Appeals for the 7th Circuit.

* * * * *

"Stating that an order requiring the respondent to terminate its unlawful discriminations will destroy the Niehoff business when its competitors are not likewise enjoined, appellant requests that this proceeding be held in abeyance until the Commission can place all industry members under identical restrictions. The pricing practices used by the respondent, however, have been found to be in violation of law. Since their continuance by the respondent is likewise unlawful, the Commission's duty, under the applicable statute, is to require their termination forthwith. That respondent's business may be adversely affected by the requirement to cease its unlawful conduct does not counterbalance the precedent which would be set by the requested action which, if followed, would mean that Commission orders would be forever pending and unlawful practices rarely, if ever, corrected."

* * * * *

Extract from "Petition for Review" Found on Page 1031 of the Printed Record in the Case of C. E. Niehoff & Co., Petitioner, v. Federal Trade Commission, Respondent, Appeal No. 11526 in the U. S. Court of Appeals for the 7th Circuit.

"GROUNDS ON WHICH RELIEF IS SOUGHT.

"8. Petitioner seeks relief from the final order entered by Respondent on the following grounds:

* * * * *

"(c) The issuance of said order as well as the issuance of the complaint upon which it is based is a misuse of the Respondent's discretion, for the evidence establishes that any requirement that Petitioner sell at uniform prices while its competitors are not under like compulsion will destroy Petitioner's business;"

* * * * *